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Naomi Mezey

Georgetown University Law Center, [mezeyn@law.georgetown.edu](mailto:mezeyn@law.georgetown.edu)

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## LOVE AS LEGAL METHODOLOGY: COMMENTS ON *LOVE IN A TIME OF ENVY*

Naomi Mezey\*

In academic papers about emotion, it is not uncommon to find a kind of disconnect between the detachment of theoretical and scholarly language and the subject of the paper—the emotions. One of the lovely, and challenging, aspects of Jonathan Goldberg-Hiller’s article is that it not only conveys the emotions that are its subject, but it brims with its own emotion; it reads like a text written out of shattered love.<sup>1</sup> Goldberg-Hiller takes up Jean-Luc Nancy’s contention that “love is shattered by its very essence. It fragments the self at the same time as it refracts into many forms.”<sup>2</sup> Goldberg-Hiller understands Nancy as suggesting caution about trying to bridge the gap between love and law, and caution about any unifying theory of love.<sup>3</sup> I suspect, however, that Goldberg-Hiller also finds in Nancy’s theory of fragmented love, a methodology and an emotional style. Goldberg-Hiller writes of love, envy, and law in ways that burst, cut, and multiply as Nancy suggests love does.<sup>4</sup> The article throws out shards of theory, literature, politics, rhetoric, psychoanalysis, visual imagery, texts, and emotions.<sup>5</sup>

The article’s fragments tell a story that is meant to come at love “askew,” through envy and temporality.<sup>6</sup> Goldberg-Hiller reads two very different narratives of emotion, one literary and one political: the

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\* Professor of Law, Georgetown University Law Center. Many thanks to Linda Meyer and Martha Umphrey for inviting my participation in this symposium. And, of course, thanks to Jonathan Goldberg-Hiller for a stimulating article on which to comment.

1. Jonathan Goldberg-Hiller, *Love in a Time of Envy*, 28 QUINNIPIAC L. REV. 699 (2010).

2. Goldberg-Hiller, *supra* note 1, at 707 (citing JEAN-LUC NANCY, *Shattered Love*, in THE INOPERATIVE COMMUNITY 82 (Peter Connor ed., Peter Connor et al. trans., 1991)); see also Jennifer L. Culbert, *Shattering Law: Encounters with Love in Billy Budd*, 28 QUINNIPIAC L. REV. 765 (2010).

3. Goldberg-Hiller, *supra* note 1, at 708-09.

4. JEAN-LUC NANCY, *Shattered Love*, in THE INOPERATIVE COMMUNITY 82 (Peter Connor ed., Peter Connor et al. trans., 1991); Goldberg-Hiller, *supra* note 1.

5. Goldberg-Hiller, *supra* note 1.

6. *Id.* at 703.

1927 novel *Envy* by Yuri Olesha<sup>7</sup> and the 2009 advertising campaign by proponents of Proposition 8 in California.<sup>8</sup> Both stories, according to Goldberg-Hiller, engage and are animated by envy.<sup>9</sup> So how does envy help us understand love, law, and their gaps and entanglements? How might it guide us toward a “social jurisprudence of love”?<sup>10</sup>

Envy is protean in Goldberg-Hiller’s article, taking the form of both ideas and emotions. Goldberg-Hiller alludes to envy in a number of ways as he wrestles with the question of a social jurisprudence of love. I have collected and categorized his shards of definition or analogy as follows:

- 1) envy as not just loss of love, but destructive of love’s order;
- 2) envy as lack;
- 3) envy as a politics;
- 4) envy as a relationship to time and aging, as temporality.

Each of these forms of envy is provocative in its own way and could be the subject of its own article, but instead Goldberg-Hiller uses them like clues or breadcrumbs, finding traces of them all in his two narratives. Indeed, it is the very multiplicity of envy, I believe, that he relies on to approach the unspeakability of love and the inevitability of time.<sup>11</sup> Perhaps it is not surprising that Goldberg-Hiller gets closest to his subjects of love and envy in his close analysis of two sets of twin emotional outbursts, one set from the novel and the other from the Proposition 8 campaign. More surprising, and or at least less obvious in Goldberg-Hiller’s analysis, is the way that these moments function: each moment is actually a double moment; in each moment love is mirrored back to itself as envy. In that space between love and its shattered reflection is the beginning of a legal methodology in which language, like law itself, mediates between reason and emotion, and aspires to a new world in which reason and emotion are not at odds. In Goldberg-Hiller’s article, emotion rides language to the surface of the page as both subject and method, but below the surface, and less accounted for, is law.

The first set of emotions that Goldberg-Hiller portrays comes from Olesha’s novel *Envy*, when the two fathers—themselves brothers—of two young lovers, Valodya and Valya, realize in quite different ways

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7. YURI OLESHA, *ENVY* (Marian Schwartz trans., N.Y. Review Books 2004) (1927).

8. Goldberg-Hiller, *supra* note 1.

9. *Id.*

10. *Id.* at 709.

11. *See id.*

what the future holds for them.<sup>12</sup> Both have struggled to make sense of the changing times, the movement from an era that valued the romantic, the poetic, the linguistic, and the emotional to a new era that prizes the rational, mechanistic, bureaucratic, and scientific.<sup>13</sup> Valodya's adoptive father Andrei comes to see that what will carry him into this future is love for his son, both as his son and as a new kind of man.<sup>14</sup> Valya's father Ivan (Andrei's brother), on the other hand, realizes he was wrong about the future; it still contains love and devotion and tenderness, "[o]nly not for us, all that's left for us is envy and more envy."<sup>15</sup> Like Sophocles' Oedipus, Ivan is caught in an ambivalent role of seeing love and time but being unable to access them, and so he seeks blindness.<sup>16</sup> In Goldberg-Hiller's reading of the novel, envy becomes the "transitional emotion" that attends social change;<sup>17</sup> the "envy of another era."<sup>18</sup> Less attended to are the "twin" emotions of the fathers and brothers, which mirror and distort each other, refracting love into envy at the same time that the literary language of the novel adjudicates social change.

The second set of emotional outbursts that Goldberg-Hiller takes up comes from the debate over legalized same sex marriage in California.<sup>19</sup> This pairing is particularly interesting because Goldberg-Hiller effectively shows how it is actually one emotional moment that comes to have two very different registers and that is put to very different purposes. This moment is Gavin Newsome's joyous response to the California Supreme Court decision legalizing same sex marriage in 2008.<sup>20</sup> It is his very outburst of hope, and loving invocation of the future, that is later set in a hall of mirrors and becomes the rhetorical and emotional centerpiece in the advertising campaign to overturn same sex marriage through Proposition 8.<sup>21</sup> As Goldberg-Hiller describes so vividly, the proponents of Proposition 8 converted Newsome's hope and love into anger and envy by repeatedly invoking and circulating the image and sound of Newsome's emotional outburst.<sup>22</sup> The repetition

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12. Goldberg-Hiller, *supra* note 1, at 718-722.

13. OLESHA, *supra* note 7.

14. *Id.* at 107; Goldberg-Hiller, *supra* note 1, at 718.

15. OLESHA, *supra* note 7, at 131; *see also* Goldberg-Hiller, *supra* note 1, at 720.

16. Goldberg-Hiller, *supra* note 1, at 719-20.

17. *Id.* at 716.

18. *Id.* at 717.

19. *Id.* at 724-42.

20. Goldberg-Hiller, *supra* note 1, at 724.

21. *Id.* at 725.

22. *Id.* at 725-26.

and decontextualized emotionality of Newsome's mirrored image not only emptied the moment of its original meaning, but made it seem jarring, excessive, and hubristic.<sup>23</sup> Goldberg-Hiller sees the tactic as an "electronic blinding of Oedipus,"<sup>24</sup> linking Newsome to Ivan as "an agent and a victim of the future, celebrated in a parade of emotions."<sup>25</sup> According to Goldberg-Hiller, Newsome's emotional outburst is rendered incapable of heralding the future of an aggrieved minority, and instead the same moment, the same voice, the same image, becomes emblematic of the excesses of a powerful interest group who were able to secure more than equality demands, who left the majority and its conscience aggrieved. Again "twin" emotions were made to mirror and distort each other, refracting love into envy at the same time that the political language of the Proposition 8 campaign adjudicated social change.

In Goldberg-Hiller's analysis of both of the emotional moments around which his article is built, the law remains submerged. Here I would like to go back to the evocative analysis of love and especially envy, and see if the law can be resurrected just a little by thinking about the conflict these emotional moments reflect and the ways in which law, like language, mediates emotional conflict and social change.

One reason this odd pairing of literary and political emotionality works so well is because both moments occur at a temporal turning point, a rupture in the transparent passage of time which allows us to see plainly the transition from one era to another, the difference between what has gone before and what is coming. Goldberg-Hiller's analysis is sensitive to the role of time as the ambiguous boundary between love and envy; indeed, temporality and change seem central to envy since we envy our own loss of love as love ages and dies, we envy the love our children are still to discover, and we envy the future as we ourselves age and die. I like the pairing of Ivan and Newsome as agents and victims of change, both blind, and both so much like the tragic western hero who ushers in the future and a new legal order in which he has no place.

In other ways, however, this pairing of Ivan and Newsome does not quite work. At least in the context of the same sex marriage debate, there is an excess of envy for which we must account. For one thing, one might have portrayed same sex marriage advocates as envious of straight marriage, envious of state recognition *as a married couple* as

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23. *Id.*

24. Goldberg-Hiller, *supra* note 1, at 734.

25. *Id.* at 732.

something desirable beyond a set of civil rights. Or as Goldberg-Hiller acknowledges, it is not really Newsome, but the proponents of Proposition 8 that most mirror Ivan, for they are the ones who resist the future of legalized same sex marriage, who are portrayed in the article as envious of a love they cannot understand and a future that is not theirs.<sup>26</sup> Thus, there is envy on both sides of the same sex marriage debate and for each justice entails having what they cannot quite possess.

Conversely, one might ask whether envy is even the most revealing emotion in this debate? One could characterize both sides in the marriage debate as not envying what they cannot possess, but fearing they will be deprived of something that they believe to be theirs by right. Proponents of same sex marriage won the right to marry in the California Supreme Court,<sup>27</sup> and Proposition 8 sought to deprive them of that right.<sup>28</sup> Opponents of same sex marriage consistently emphasized that Proposition 8 would not take rights away from gay couples (since they still had extensive domestic partner protection under state law) but that “access to marriage for gay couples would reduce the rights available to *others*.”<sup>29</sup> The harms that same sex marriage occasioned were to those who were “out of step with changing social mores” and whose values were in deep tension with a public school curriculum that advocated tolerance and normality for gay families.<sup>30</sup> If we were to speculate on the emotional tenor of the debate, I would guess both sides felt less conventionally envious and more *aggrieved*, or they felt envy *as* anxiety about and resistance to change. To borrow from one of the voice-overs in a pro Proposition 8 advertisement: “How do cultures change? How do they stop being one thing and become another? Things that have been tradition and custom become replaced with an entirely new reality.”<sup>31</sup> There is something truly poignant about this ad,

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26. *Id.* at 735-42.

27. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

28. California Attorney General Jerry Brown retitled the ballot initiative “Eliminates Right of Same-Sex Couples to Marry Act” on the general election ballot. Christine DeRenzis, *A Look at California's Proposition 8: The 'Eliminates Right of Same Sex Couples to Marry Act,'* ASSOCIATED CONTENT, Sept. 29, 2008, [http://www.associatedcontent.com/article/1070600/a\\_look\\_at\\_californias\\_proposition\\_8.html](http://www.associatedcontent.com/article/1070600/a_look_at_californias_proposition_8.html).

29. Chai Feldblum, *The Selling of Proposition 8*, GAY & LESBIAN REV. WORLDWIDE, Jan.-Feb. 2009, at 34, 34.

30. *Id.* at 35. Of course, nothing about legalized same sex marriage changed the scope of the nondiscrimination norm in public schools, but Feldblum argues that one of the reasons that Californians bought the argument that it might was because “gay rights advocates have not forthrightly addressed the natural tensions that have arisen as our social norms have begun to shift.” *Id.* at 36.

31. DVD: Proposition 8 and the Case for Traditional Marriage (American Family

about its reflection on the unrecognizability of the future, about the trauma that some cultural changes inflict when they appear to reject the values around which an older generation has ordered its life. While I am not sure the primary emotion of this cultural change is envy, I am fairly confident that this type of change has rarely occurred in the twentieth century without a simultaneous debate about rights, and some legal intervention. The challenge, then, is to make sense of how the emotional and legal expressions of conflict intersect to illuminate Goldberg-Hiller's social jurisprudence of law.

The more one thinks about what exactly envy is, the more it seems to escape analysis. Yes, it is about loss of love, about lack, it is a politics that resists change, and a relationship to time. But when does loss of love provoke envy and when does it inspire something else? Does the lack that attends all human psychological development not induce desire and alienation as much if not more than envy? If there is a politics of envy, does it have content, a platform? And if envy is about a relationship to time, what distinguishes envy from a future one cannot have from say, nostalgia for a past one fantasizes, or from any temporal longing such as fear, anxiety, excitement, and grief? While much of the article's analysis is rich and evocative, it also has a tendency to retreat to abstraction the closer to its object it gets.

How, finally, does envy's relationship to love intersect with, resist, or illuminate law? What about the *legality* of the Proposition 8 battle fed or inflected the love and envy the political campaign generated? To capture more of the affective and emotional significance of law in this instance might require subjecting same sex marriage itself to greater critique as both a narrative of romantic love and an object of law. The desire of gay couples to be regulated and domesticated, to be recognized by law, is itself a noteworthy moment in the trajectory of this particular rights battle.

Perhaps the key to the triangulation of love, envy, and law resides less in the future and the difficulty of signing the world over to our children and more (or at least equally) in the past, in our own childhoods, where the Oedipus that links love, envy, and law is not primarily Greek but Freudian, and the first love object is not the father but the mother. There, love for the mother, envy of the father, and the judicial functions of the super-ego come together. Alternatively, to think of it through Lacan, in the Oedipal stage we enter the symbolic order of

language and law.<sup>32</sup>

Here we come back to what it means to say that Goldberg-Hiller uses shattered love as a method of legal analysis. It suggests that our access to love and law is always through language, and even with language we can only manage fragments, reflections, analogies. The legal language of analogy, like Jennifer Culbert's use of simile, preserves a gap between the objects it analogizes.<sup>33</sup> Goldberg-Hiller ends his article not in fragments of theory but in fragments of emotion and law, in analogies between sexual desire and the legal categories that might best protect the plasticity of love and desire.<sup>34</sup> Perhaps it is language itself, the poetic quality of analogy, and conflicts over meaning that links love, envy, and law.<sup>35</sup> Perhaps it is the very acknowledgement and relish of law's rhetorical dependence and affective quality that requires a different language and method for law. In law's commitment to and love of deciding and fixing meaning there is always a loss, politically and existentially; in a "world of competing worlds," the law in each instant chooses only one.<sup>36</sup> In this sense, as Susan Heinzelman says, law breeds its own tragedies.<sup>37</sup>

Goldberg-Hiller's closing legal analogies are refracted through emotion: the poignancy of passing time and familial love and conflict. As in *King Lear*, law and love do battle first within the family.<sup>38</sup> Perhaps what most fuels both love and law is conflict. Freud said: "Some obstacle is necessary to swell the tide of the libido to its height; and at all periods of history, wherever natural barriers in the way of satisfaction have not sufficed, mankind has erected conventional ones in order to be able to enjoy love."<sup>39</sup> The same might be said of the pleasures of law as it produces and mediates conflict in that affective space between reason and violent emotion.

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32. JEANNE LORRAINE SCHROEDER, *THE FOUR LACANIAN DISCOURSES OR TURNING LAW INSIDE-OUT* 15-17 (2008).

33. Culbert, *supra* note 2.

34. Goldberg-Hiller, *supra* note 1, at 742-44.

35. *Id.*

36. *Id.* at 713 (quoting Jacques Rancière, *The Thinking of Dissensus: Politics and Aesthetics* 7 (Sept. 2003) (unpublished manuscript, on file with author)).

37. Susan Sage Heinzelman, *When Law and Love are not Enough: King Lear and the Spectacle of Terror*, 28 QUINNIPAC L. REV. 755 (2010).

38. *Id.*

39. SIGMUND FREUD, *SEXUALITY AND THE PSYCHOLOGY OF LOVE* 67 (Touchstone 1997) (1963).



